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IN THE

Supreme Court of the United States

No. 337.

October Term, 1954.

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, and JOHN E. SMALLWOOD,

Petitioners,

v.

HONORABLE WILLIAM H. KIRKPATRICK, Etc.,

Respondent.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

No. 337.

October Term, 1954.

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, AND JOHN E. SMALLWOOD,
Petitioners,

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.,
Respondent.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

I. Where, in the exercise of his discretion under Title 28 U. S. C. § 1404(a), a district judge concludes that a transfer would serve the convenience of parties and witnesses and the interest of justice, should the transfer be ordered without regard to the limitations thought to have been applicable to dismissals under the doctrine of *forum non conveniens?*

II. Is the extraordinary writ of mandamus available to review a district court's interlocutory exercise of discretion in granting a motion for transfer under Title 28 U. S. C. § 1404(a) where the court gave due weight to the interests specified by the statute?

STATEMENT OF THE CASE.

Petitioners brought suits under the Federal Employers' Liability Act in the United States District Court for the Eastern District of Pennsylvania to recover for injuries sustained in a derailment near Dillon, South Carolina. The defendant, Atlantic Coast Line Railroad Company, filed motions under Title 28 U. S. C. §1404(a) to transfer the actions to the United States District Court for the Eastern District of South Carolina (Florence Division), the district and division in which the accident occurred. Chief Judge Kirkpatrick, in the exercise of the discretion conferred by Section 1404(a), granted the transfer motions (R. 14).[1]

In his opinion Judge Kirkpatrick discussed the salient features of the affidavits which were filed in support of and in opposition to the transfer motions (R. 12-14).[2] He found that the Railroad Company would need to produce, at considerable expense, nearly twenty-four witnesses concerning the issue of liability (R. 13).[3] The defense witnesses reside chiefly in North and South Carolina, and the estimated cost of their attendance at trial in Philadelphia is close to $5,000.[4] On the other hand, he observed that peti-

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1. His opinion granted the motions and directed the submission of appropriate orders for transfer which were duly submitted. No formal orders transferring the cases have as yet been entered.

2. All of the affidavits are set forth in the Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 1a-39a.

3. Most of these witnesses testified in three actions, arising out of the same derailment, which were tried in the United States District Court for the Eastern District of South Carolina during the February Term, 1954. *Lynch v. Atlantic Coast Line R. R.*, Civil Action No. 3933; *Heimowitz v. Atlantic Coast Line R. R.*, Civil Action No. 3931; *Fields v. Atlantic Coast Line R. R.*, Civil Action No. 3727.

4. See Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 4a-5a, 9a-11a, 15a-17a, 18a-20a.

tioners would need to call, at most, only two or three of their possible passenger witnesses with reference to the speed of the train (R. 13).[5] As to medical testimony, he believed that the Railroad Company would need to call some of the more than a dozen doctors and hospital employees who had treated petitioners in South Carolina (R. 13) and recognized that petitioners would need the testimony of Washington and Philadelphia physicians who had examined or attended petitioners after their discharge from South Carolina hospitals (R. 14). He pointed out that Petitioners Smallwood and Tunstall are residents of Washington, D. C., and that their Washington physicians would have to leave their practice to attend a trial in either Philadelphia or South Carolina (R. 14).

Chief Judge Kirkpatrick concluded that there was a "heavy balance of convenience in favor of the defendant in connection with the liability witnesses" (R. 14). He considered the congested condition of the court calendar in the Eastern District of Pennsylvania and made allowance for "the weight to be given to the plaintiffs' choice of a forum" (R. 13-14). He remarked that Petitioner Norwood, the only resident of the district where the suits were brought, had a stronger case than the other two with regard to medical witnesses (R. 14) but found this insufficient to outweigh the heavy balance in favor of transfer with respect to liability witnesses, particularly in view of the fact that Norwood had initially selected Chicago as an appropriate and convenient forum by instituting suit there prior to his suit in Philadelphia (R. 14).[6]

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5. Substantially all of petitioners' list of suggested witnesses reside in New York. Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 24a-27a.

6. Norwood originally instituted suit against the Railroad Company in Chicago and maintained that action for some months after bringing the present suit in Philadelphia (R. 14). Tunstall had also started suit in Chicago. Each petitioner had been represented by New York counsel, by Chicago counsel, and finally by Philadelphia counsel. Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 22a-23a.

Following the filing of Judge Kirkpatrick's opinion granting the transfer motions, petitioners applied for writs of mandamus or prohibition to restrain the entry of an order transferring the cases (R. 1-6). The Court of Appeals for the Third Circuit denied the writs and a subsequent application for rehearing, without opinion (R. 7-8, 20-21). This Court granted certiorari on November 8, 1954 (R. 22).

SUMMARY OF ARGUMENT.

I. Title 28 U. S. C. § 1404(a) authorizes a district court, in its discretion, to transfer any civil action from the district in which it is brought to another district "for the convenience of parties and witnesses, in the interest of justice." Concluding that the factors enumerated in the statute warranted it, the district judge, in his discretion, directed a transfer. He based his action on the terms of the statute, rather than on what he described as the "stringent requirements" of the doctrine of *forum non conveniens*. Since the statute authorizing transfers is clear, it must be taken to mean what it says and resort may not be had to the reviser's note or the legislative history in order to read into the statute limitations which Congress has not ex-expressed. Furthermore, the history of the legislation, the circumstances leading up to its enactment, and the views of its draftsmen demonstrate that Congress intended the statute to be applied without regard to any preconceived limitations. This Court's decision in *Ex Parte Collett*, 337 U. S. 55 (1949), establishes that the statute means what it says and that transfer is available in situations where dismissal could not be obtained because of *forum non conveniens*. The transfer remedy is less drastic than dismissal and, therefore, was not intended to be subject to the same restrictions. The statute is remedial and must be liberally construed in the interest of efficient administration of justice.

II. Mandamus is an extraordinary remedy reserved for extraordinary situations. If it is used as a substitute for an appeal from interlocutory orders, the policy against piecemeal appeals will be defeated. Mandamus is not available to review the discretion of a district judge exercised in conformity with the provisions of Section 1404(a). The transfer orders in the instant cases were consistent not only

with the criteria established by Section 1404(a) but also with the standards derived from the doctrine of *forum non conveniens*. The applications for mandamus, which would hamper the effective operation of Section 1404(a), were properly denied as mere attempts to review the district judge's discretion.

ARGUMENT.

I. Title 28 U. S. C. § 1404(a) Grants to District Courts a Discretionary Power to Transfer Civil Actions for the Convenience of Parties and Witnesses and in the Interest of Justice Without Regard to Limitations Thought to Be Derived from Forum Non Conveniens.

In his opinion the respondent, Chief Judge Kirkpatrick, discussed the facts submitted in support of and in opposition to the motions for transfer involved in these cases. He considered the weight to be given to petitioners' choice of forum, the congested condition of the court calendar in the Eastern District of Pennsylvania, the fact that the only petitioner who resided in that district had previously instituted suit in Chicago, and the conflicting conveniences of defendant's medical witnesses in South Carolina and petitioners' medical witnesses in Washington, D. C., and Philadelphia. He found a "heavy balance of convenience in favor of the defendant in connection with the liability witnesses" (R. 14) and concluded that "the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper" (R. 12). Accordingly, he exercised the discretion accorded to him by Title 28 U. S. C. § 1404(a) and granted the transfer motions.

He stated that the cases could not properly be transferred "if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute" (R. 12) were applied. In directing the transfer without regard to his concept of those requirements, he followed the holding of the Court of Appeals for the Third Circuit in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010, 1011 (3d Cir. 1952), that the words of Section 1404(a) "should be considered for what they say, not with preconceived limitations derived from the *forum non conveniens* doctrine".

The language of the statute is clear.[7] In concise and unequivocal language, it establishes the circumstances under which the discretion to transfer may be exercised, as follows [Title 28 U. S. C. § 1404(a)]:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Congressional intent must be determined primarily from the language of the statute itself. *Magnano Co. v. Hamilton*, 292 U. S. 40, 46-47 (1934). Where the statutory language is clear, there is no need to refer to extraneous guides such as legislative history. *Ex Parte Collett*, 337 U. S. 55, 61 (1949); *Wilbur v. United States*, 284 U. S. 231, 237 (1931). As this Court said in *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 89 (1935):

> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

In order to impose unexpressed limitations on the discretion to transfer granted by Congress, petitioners would create ambiguity where none exists. They assert that since the statute "*says nothing one way or the other concerning the limitations of forum non conveniens*" it is not clear and free from ambiguity in this respect.[8] Although disclaiming

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7. As the court said in *Hayes v. Chicago, R. I. & P. R. R.*, 79 F. Supp. 821, 826 (D. Minn. 1948), holding that Section 1404(a) applied to actions under the Federal Employers' Liability Act:

> *"We do not find it necessary to indulge in any discussion of statutory construction . . . The statute is direct, clear, and free from any ambiguity. Its terms are broad and without any limitation."* (Emphasis supplied.)

8. Petitioners' Brief, p. 21.

any purpose "to make words mean something different from what they say", they would read into the statute limitations in no way suggested by its terms.[9] Such "ambiguity" may not be created, where none exists, in order to make an opportunity for statutory construction. *United States v. Missouri Pacific R. R.*, 278 U. S. 269, 277 (1929).

Although the language of Section 1404(a) is clear, its legislative history may be examined to confirm the meaning conveyed by the words used. As was said in *United States v. Missouri Pacific R. R.*, 278 U. S. 269, 278 (1929):

> ". . . where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. . . .
>
> *"But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used."* (Emphasis supplied.)

Petitioners claim that in Section 1404(a) Congress did nothing more than adopt "the established, well recognized, and clearly delineated doctrine of *forum non conveniens*".[10] Their claim is at odds with the reasons for and circumstances leading up to enactment of the statute. Section 1404(a) was incorporated into the second draft of the revised Code in 1945, before this Court had even determined, in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947), and *Koster v. Lumbermens Mutual Casualty Co.*, 330 U. S. 518 (1947), that the doctrine of *forum non conveniens* could be applied

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9. *Ibid.*

10. Petitioners' Brief, pp. 10, 22.

in federal court proceedings.[11] As later stated in *United States v. National City Lines*, 334 U. S. 573, 578, 581 (1948), "the non-statutory doctrine commonly, though not too accurately, labeled *forum non conveniens*" involves a "vague and discretionary power".[12] When they wrote Section 1404(a), in 1945, the draftsmen of the Code could hardly have regarded it as adopting a "clearly delineated doctrine", since the "vague and discretionary power" was not established until two years later, when this Court decided *Gulf Oil Corp. v. Gilbert, supra.*

Section 1404(a) appears in an act entitled "An Act to revise, codify, and enact into law" Title 28 of the United States Code.[13] This Court pointed out, in *Ex Parte Collett*, 337 U. S. 55, 61 (1949), that the legislation revises as well as codifies,[14] and held that Section 1404(a) applies to cases

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11. See Moore, Commentary on the Judicial Code, ¶ 0.03(29), pp. 205-207 (1949 ed.). This Court discussed the legislative history of Title 28 U. S. C., including Section 1404(a), in considerable detail in *Ex Parte Collett*, 337 U. S. 55, 63-71 (1949). It pointed out that the initial appearance of Section 1404(a) was in the second draft of the Code, adopted in May of 1945, and that the text of this section of the Code remained unchanged from that time until the date of final adoption, on June 25, 1948. The reviser's note to Section 1404(a), on which petitioners place much reliance, also made its first appearance in May of 1945 in language substantially the same as the reviser's note accompanying this section at the time of its adoption.

12. As Paxton Blair observed in his article *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1, 2 (1929), the doctrine of *forum non conveniens* is not really a doctrine but a factual situation—the factual situation of an inconvenient forum. See, for example, the use of the term in *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 186 (1952). In *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947), it was said that the doctrine "leaves much to the discretion of the court" and that "the combination and weight of factors requisite to given results are difficult to forecast or state". Justice Black, in his dissent, observed (p. 516) that the discretion exercisable under the doctrine is "broad and indefinite".

13. Act of June 25, 1948, 62 Stat. 869.

14. Both of the House reports and the Senate report referred to the bill as a revision. H. R. Rep. No. 2646, 79th Cong., 2nd Sess.

(so-called special venue actions) not subject to dismissal under the doctrine of *forum non conveniens*. Therefore, Section 1404(a) is among those sections of the Judicial Code that revised, rather than codified, existing law. It is remedial in nature and should be liberally construed. *Stewart v. Kahn*, 11 Wall. 493, 504 (U. S. 1870).

Petitioners rely on the reviser's note which accompanies Section 1404(a) to support their contention that it is subject to the limitations of *forum non conveniens*. The reviser's note states:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, *permitting transfer* to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. *The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.*" (Emphasis supplied.)

The statement that the statute was drafted *in accordance with* the doctrine of *forum non conveniens* does not mean that the statute merely *codifies* that doctrine. The doctrine of *forum non conveniens* involves dismissal; Section 1404(a) provides only for transfer. The statute was

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1 (1946); H. R. Rep. No. 308, 80th Cong., 1st Sess. 1 (1947); S. Rep. No. 1559, 80th Cong., 2nd Sess. 1 (1948).

In the hearings before the Senate, Congressman Devitt, who was a member of the House committee which considered the bill, explained that the bill revised as well as codified. Hearings before Senate committee on H. R. 3214, 80th Cong., 2nd Sess. 18 (1948). And when the bill was debated on the Senate floor any thought that it was merely a codification was specifically corrected by Senator Donnell, chairman of the judiciary subcommittee which considered the Code. 94 Cong. Rec. 7928 (1948).

drafted "in accordance with the doctrine of forum non conveniens" in the sense that the considerations of convenience of parties and witnesses, and the interest of justice which are specified as the basis for transfer are the same as the considerations involved in deciding whether or not to dismiss because of *forum non conveniens.*[15] The last sentence of the note expresses the legislative purpose served by the concise language of the statute.

On the basis of the reviser's note, petitioners seek to read into the statute words which Congress has not expressed. A comparable attempt was rebuffed in *Pope v. Atlantic Coast Line R. R.*, 345 U. S. 379 (1953). There it was argued that the reference in the note to the *Kepner* case was effective to confer upon state courts the power to enjoin their residents from prosecuting Liability Act suits in foreign jurisdictions. The argument was rejected because the statute, by its terms, applies only to the federal courts. By the same token, the reference in the reviser's note to "the doctrine of forum non conveniens" cannot be said to limit the discretionary power to transfer granted by the clear language of Section 1404(a).

Particularly in light of the painstaking care with which the Judicial Code was revised, the words of Section 1404(a) must be taken to mean what they say. As this Court said in *Ex Parte Collett*, 337 U. S. 55, 65-66 (1949):

> "This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code. And from the start, Congress obtained the most eminent expert assistence available. The spadework was entrusted to two lawbook-publishing firms, the staffs of which had unique experience in statutory codification and revision. They formed an advisory

15. In his "Preface to Title 28, U. S. C. A.", p. vi, Judge Maris, chairman of the Judicial Conference committee on revision of the Judicial Code, refers to Section 1404(a) as "authorizing the transfer of a civil action upon the ground of forum non conveniens". See also discussion *infra* at pp. 19-20.

committee, including distinguished judges and members of the bar, and obtained the services of special consultants. Furthermore, an advisory committee was appointed by the Judicial Conference."

The views of the experts who assisted Congress in revising the Code confirm the plain meaning of Section 1404(a). Two special consultants, Professor James William Moore and Judge Alexander Holtzoff, advised the committee in matters of federal procedure.[16] W. W. Barron was engaged as chief reviser.[17] Judge John J. Parker, senior circuit judge of the Court of Appeals for the Fourth Circuit, served as judicial consultant to the advisory committee, and Circuit Judge Maris, of the Third Circuit, was Chairman of the Judicial Conference committee on revision of the Judicial Code.[18]

Section 1404(a) appeared in the second draft of the Code as a result of Professor Moore's proposal of March 1945, and was ultimately enacted without any change.[19] When he appeared before the House subcommittee considering the Code Professor Moore pointed out certain important changes.[20] Speaking of venue he said:[21]

> "Venue provisions have not been altered by the revision. *Two changes of importance have, however, been made.* Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. *And section 1404 introduces an element of convenience which gives the court the*

16. H. R. Rep. No. 2646, 79th Cong., 2nd Sess. 3 (1946); H. R. Rep. No. 308, 80th Cong., 1st Sess. 3 (1947).

17. *Ibid.*

18. *Ibid.*

19. Moore, *Commentary on the Judicial Code*, ¶ 0.03(29), pp. 205-206 (1949 ed.).

20. Hearings before subcommittee of Committee of the Judiciary of the House on H. R. 2055, 80th Cong., 1st Sess. 27 et seq. (1947).

21. *Id.*, p. 29.

> *power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice. . . .*" (Emphasis supplied.)

He made no reference to Section 1404(a) as a codification of the doctrine of *forum non conveniens*. On the contrary, he explained the transfer remedy as being "in line with modern State practice". In fact, it was not until after his testimony that this Court decided, in the *Gulf Oil* case, that federal courts could dismiss actions because of *forum non conveniens*.

In his *Commentary on the Judicial Code*, ¶ 0.03(29), p. 202 (1949 ed.), Professor Moore discusses the need for Section 1404(a). He refers to "forum shopping" by plaintiffs in actions under the Federal Employers' Liability Act, "in the hope of a larger verdict or for some other reason unrelated to a prompt and impartial trial" and explains how the Code sought to correct this evil, saying (p. 203):

> "A sensible treatment was to refrain from narrowing the choice of venue or from attempting to restrict the developed principles as to when a defendant is amenable to service of process, but *to give the district court the power to exercise a broad discretion in the light of all relevant factors and, where these warranted, to transfer, not dismiss, to a proper and more convenient forum. Subsection (a) of § 1404 has done this.*" (Emphasis supplied.)

Recognizing the relationship between a motion under Section 1404(a) and the doctrine of *forum non conveniens*, he places the latter in proper perspective, stating (pp. 208-209):

> "The motion calls for the exercise of a sound discretion by the district court. . . . [He then points out the factors generally to be considered, as set forth by Justice Jackson in *Gulf Oil Corp. v. Gilbert*, 330

U. S. 501, 508-509 (1947).] But it should be recalled that Justice Jackson was dealing with forum non conveniens at a time when, if applied, it resulted in a *dismissal* of the action, while under § 1404 it now results in a transfer. *As a consequence courts may now properly utilize the doctrine more freely than it was proper to do when dismissal resulted.*" (Emphasis supplied in part.)

In the same vein, Judge Holtzoff, the advisory committee's other special consultant on federal procedure, and Chief Reviser Barron state:[22]

> "Each application for transfer, on the ground of convenience of parties and witnesses presents an individual problem, the solution of which depends on circumstances peculiar to the litigation, and wide latitude is afforded the court for the exercise of its sound discretion. *The discretion to be exercised is broader than the discretion exercised under the doctrine of forum non conveniens.*" (Emphasis supplied.)

As Judge Holtzoff said in *United States v. E. I. Du Pont De Nemours & Co.*, 83 F. Supp. 233 (D. D. C. 1949), at page 233:

> "*This provision* [*§ 1404(a)*] *introduced a new principle into Federal judicial procedure.* It is a comprehensive, general statute applicable to all civil actions without exception. The innovation is salutary, as it enables the courts to make desirable adjustments as to places of trial, and puts plaintiffs and defendants more nearly on a plane of equality in those situations in which an action may be brought in any one of several districts. Previously, the final choice of the jurisdiction lay entirely with the plaintiff. This result obviously involved an element of unfairness, which the new statute endeavors to meet." (Emphasis supplied.)

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22. 1 Barron & Holtzoff, *Federal Practice and Procedure*, pp. 56-57 (1954 Supp.).

Similarly, Chief Judge Parker, judicial consultant to the advisory committee, said, in *Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950):

> "A dismissal in application of that [forum non conveniens] or any other principle puts an end to the action and hence is final and appealable. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes. *The notion that 28 U. S. C. A. § 1404(a) was a mere codification of existing law relating to forum non conveniens is erroneous. It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.*" (Emphasis supplied.)

Judge Maris, Chairman of the Judicial Conference Committee on revision of the Judicial Code, shares the views of the other draftsmen of the Code. He joined in the unanimous opinion of the Court of Appeals for the Third Circuit, sitting *en banc*, in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010, 1011 (3d Cir. 1952), where the court (in an opinion by Judge Goodrich) said:

> "*The forum non conveniens doctrine is quite different from Section 1404(a).* That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. *Section 1404(a) avoids this latter danger. Its words*

of forum is a real hardship, or an imposition on the court" (p. 948). Although holding that dismissal under *forum non conveniens* was improper, it remanded the case for consideration of the propriety of transfer under Section 1404(a), saying (p. 948):

> "Transfer is a less drastic matter than dismissal, for it involves no loss of time or pleading or costs; and no doubt a broader discretion may be exercised in ordering it."

Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp., 177 F. 2d 360, 362 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950), is to the same effect. Chief Judge Parker's opinion (quoted in part *supra* at p. 16) stressed the difference between dismissal and transfer, and concluded that Section 1404(a) grants a broad power to transfer which may be invoked without regard to the doctrine of *forum non conveniens*.

In the very recent case of *In re Josephson*, — F. 2d — (1st Cir. December 23, 1954—not yet reported), the differences between the statute and the doctrine of *forum non conveniens* were again explained. The court concluded that, since Section 1404(a) is not a mere codification of the doctrine of *forum non conveniens*, a transfer may be granted whether or not dismissal under the doctrine of *forum non conveniens* would have been appropriate.

Petitioners rely chiefly on *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (2d Cir. 1950), *cert. denied*, 340 U. S. 851 (1950). Judge Frank, who wrote the majority opinion in that case, held that the district court had not abused its discretion in refusing to order a transfer. He believed that Section 1404(a) did not alter the standards previously embodied in the doctrine of *forum non conveniens* and relied on language in the *forum non conveniens* case of *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947), that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed". Judge Swan

concurred solely on the basis that the court lacked power to review a refusal to transfer by writ of mandamus. Chief Judge Learned Hand concurred "solely upon the ground that" the venue statute involved "gives to a plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience" (p. 332). Judge Frank's opinion represents his views alone and cannot be said to express the opinion of the court as a whole. Relying on the *Ford Motor Co.* case and on the reviser's note petitioners would rewrite Section 1404(a) to permit transfers only if the *overwhelming* convenience of the parties and witnesses and the *overwhelming* interest of justice were served thereby. Even if that case and the reviser's note could be said to lend support to their contention, the insertion of the word "overwhelming" in the unambiguous language of the statute would represent the clearest sort of judicial legislation.

Petitioners quote portions of the opinions in *Nicol v. Koscinski*, 188 F. 2d 537 (6th Cir. 1951), and *Wiren v. Laws*, 194 F. 2d 873 (D. C. Cir. 1951), *cert. denied*, 346 U. S. 938 (1954), and list a large number of district court decisions as supporting their attempt to limit the clear language of Section 1404(a). Basically these cases hold that the various interests enumerated in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508-509 (1947), are substantially the same as the interests to be considered under Section 1404(a). Accordingly, there are frequent references to *forum non conveniens* in these Section 1404(a) cases. Some courts describe the application of the statute in terms of *forum non conveniens*, others in terms of "balance of convenience". However, as Judge Irving Kaufman of the Southern District of New York points out in his *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F. R. D. 595, 598 (1951) (written after the decision of the court of appeals of his circuit in *Ford Motor Co. v. Ryan, supra*):

> "Despite these varying characterizations, there is really little disagreement among the courts as to the applicability and scope of the section. All are more

> or less in agreement that the remedy under 1404(a)—i. e. transfer—is less harsh than the dismissal under forum non conveniens, and hence are more prone to grant a transfer upon a showing of inconvenience."

The decisions upon which petitioners rely recognize that plaintiff's choice of forum is an important factor to be considered, under Section 1404(a), so that a bare balance of convenience in favor of defendant and his witnesses is insufficient to warrant disturbing plaintiff's choice of forum. Petitioners' claim that the Third Circuit's decision in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010 (3d Cir. 1952), "is a mandate to district court judges to refuse to recognize the plaintiff's choice of forum as a factor"[24] in considering a motion for transfer is completely unjustified. In the *Modarelli* case, the district court had denied a motion for transfer and the court of appeals refused to issue mandamus because the district court had "considered the interests stipulated in the statute and decided thereon" (p. 1012). Thus plaintiff's choice of forum was sustained, and nothing in the opinion can be taken as a direction to district courts to ignore the important interest of plaintiff's choice of forum. Rather, as a district court in the Third Circuit has said in refusing transfer [in *Busch v. Reiss S. S. Co.*, 120 F. Supp. 886, 887 (D. Del. 1954)]:

> "I do not understand the Modarelli case to say, however, that the plaintiff's choice of forum is not a factor to be considered in the application for transfer under 1404(a) or that the conveniences of the defendant and his witnesses must not somewhat outweigh the conveniences of the plaintiff and his witnesses, together with his generally accorded privilege of choice of forum."

In the instant cases Chief Judge Kirkpatrick stated that he had "not overlooked the weight to be given to the

24. Petitioners' Brief, p. 15.

plaintiffs' choice of a forum" but found that "the heavy balance of convenience in favor of the defendant in connection with the liability witnesses" dictated transfer (R. 13, 14). Thus, even if petitioners were correct in their contention concerning the meaning of the *Modarelli* case, there would be no reason to question the transfers in the instant cases as having failed to give weight to plaintiffs' choice of forum.

Chief Judge Kirkpatrick examined the facts in the instant cases in the light of the interests stipulated in Section 1404(a), without qualifying the clear meaning of the statute by any judicial "gloss" derived from *forum non conveniens*. After careful consideration of all the pertinent factors (which are substantially the same under Section 1404(a) or under *forum non conveniens*), he exercised his discretion in favor of the transfer.

Apparently recognizing the weakness of their attempt to circumscribe the district court's discretion with limitations thought to be derived from the doctrine of *forum non conveniens*, petitioners go beyond that doctrine and seek to bring into this case interests which not only have no place under Section 1404(a), but were rejected by this Court when it applied the doctrine of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947). They assert that verdicts are not as high in the transferee forum (South Carolina) as in Philadelphia.[25] Factors which lead to "forum shopping", such as the anticipation of higher jury verdicts, are irrelevant not only in considering transfers under Section 1404(a),[26] but also in deciding dismissals under the doctrine of *forum non conveniens*. *Gore v. United States Steel Corp.*, 15 N. J. 301, 312-313, 104 A. 2d 670, 676-

25. Petitioners' Brief, p. 3, p. 17 n. 1.

26. See *Henderson v. American Airlines, Inc.*, 91 F. Supp. 191 (S. D. N. Y. 1950), and Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F. R. D. 595, 607 (1951). As the Seventh Circuit said in *Chicago, R. I. & P. R. R. v. Igoe*, 212 F. 2d 378, 382 (7th Cir. 1954):

> ". . . we cannot presume that a trial will proceed other than fairly in any federal forum in which venue exists."

677, *cert. denied,* 348 U. S. 861 (1954). In the *Gulf Oil* case, the argument was made that dismissal under the doctrine of *forum non conveniens* would prejudice plaintiff because jurors in the convenient forum (Virginia) were unaccustomed to dealing with sums of the size claimed in damages while New York jurors would not be staggered by such sums. This contention was rejected by the Court, which said (330 U. S. 501, 510):

> "This unproven premise that jurors of New York live on terms of intimacy with $400,000 transactions is not an assumption we easily make. Nor can we assume that a jury from Lynchburg and vicinity would be 'staggered' [by the sum] . . . . The net of this is that we cannot say the District Court was bound to entertain a provincial fear of the provincialism of a Virginia jury."

Petitioners also contend that there is something unusual and different about the initial selection of forum in cases brought under the Federal Employers' Liability Act. Nothing in the decision of this Court in *Boyd v. Grand Trunk Western R. R.,* 338 U. S. 263 (1949), relied upon by petitioners, supports such a contention. The holding in *Ex Parte Collett,* 337 U. S. 55, 60 (1949), is flatly to the contrary. This Court there pointed out that Section 6 of the Liability Act defines the proper forum and Section 1404(a) deals with the right to transfer an action properly brought. "The two sections deal with two separate and distinct problems" (p. 60).[27] The reviser's note accom-

27. Substantially the same argument as petitioners make herein was made in *Conley v. Pennsylvania R. R.,* 87 F. Supp. 980, 981 (S. D. N. Y. 1950), in which the court said:

> *"This court rejects the interpretation placed upon the Boyd case by plaintiff's counsel. The Boyd case did not involve the application of Section 1404(a).* The question there merely involved the validity of an agreement made by the employee wherein he agreed in advance that if he ever brought suit against his employer, that a choice would be made of the specified districts in the agreement for the venue of the action. Such an agreement the Supreme Court held was invalid." (Emphasis supplied.)

panying Section 1404(a) and the broad language of the statute demonstrate that the first choice made by plaintiff does not exempt him from the power of the court, after due consideration of the interests stipulated in the statute, to transfer the case to a place more suitable for trial.

Subsequent to the decision holding that Section 1404(a) applied to Liability Act cases [*Ex Parte Collett, supra*], and subsequent to decisions holding that Section 1404(a) is not subject to the limitations of *forum non conveniens* [*Amalgamated Ass'n v. Southern Bus Lines, Inc.*, 172 F. 2d 946 (5th Cir. 1949); and *Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F. 2d 360 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950)], no less than nine bills were introduced in Congress to exempt Liability Act cases from the operation of Section 1404(a).[28] All were disapproved by the Committee on Venue and Jurisdiction of the Judicial Conference of the United States and none was ever reported out of the House Committee on the Judiciary.[29] In seeking special treatment for Liability Act cases, not only would petitioners have this Court reverse its holding in *Ex Parte Collett;* they would also have it do, by judicial fiat, what Congress has refused to do.

Petitioners have "shopped around", not for a convenient forum but for one to their liking. Before retaining Philadelphia counsel and commencing the instant cases they had retained different attorneys in New York and Chicago and two of them had even instituted suits in Chicago.[30] Recognizing this, Judge Kirkpatrick found it impossible to accept at face value the contention that Philadelphia was the appropriate and convenient forum (R. 14).

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28. H. R. 7585, H. R. 7636, H. R. 7640, H. R. 7642, H. R. 7841, H. R. 7868, H. R. 7885, H. R. 7893, and H. R. 8019, all 81st Cong., 2nd Sess. (1950).

29. Report of the Judicial Conference of the United States, September Session, 1951, Committee on Venue and Jurisdiction, p. 28.

30. Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 22a-23a.

"Forum shopping" in the hope of obtaining higher jury verdicts, so prevalent in Liability Act cases prior to Section 1404(a), was the very evil that the statute was designed to correct. See Moore, *Commentary on the Judicial Code*, ¶ 0.03(29), pp. 202-203 (1949 ed.) and the reviser's note to Section 1404(a) which refers to *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941), a "shopped" Liability Act case, used by the reviser to illustrate the need for the statute.

In refusing to engraft upon the clear meaning of Section 1404(a) "stringent requirements" thought to be derived from the doctrine of *forum non conveniens*, the respondent has correctly applied the statute to facts which, within his discretion, made the transfers appropriate. Refusal to transfer these cases from a forum for which petitioners have "shopped" would have subjected defendant and its witnesses to grave inconvenience and expense. It would have caused a substantial loss to the defendant, regardless of the ultimate outcome of a trial on the merits.

The transfers were necessary for the reasons Congress specified in Section 1404(a)—convenience of parties and witnesses and the interest of justice. By this statute Congress has given district courts the means to administer justice in an orderly and efficient manner.

> "The legislature must see to it that wise and progressive judges are provided with the tools of justice. And the legislative foundation of judicial action must be broad-based and modernized. These objectives this bill [Title 28 U. S. C.] assists in achieving."[31]

Section 1404(a) provides an effective tool for "broad-based and modernized" judicial action. Petitioners' attempts to circumscribe the salutary remedy provided by the clear language of the statute were properly rebuffed by the court of appeals.

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31. Statement of John F. X. Finn, special counsel to the House committee, speaking of the revised Judicial Code. Hearings before subcommittee of Committee of Judiciary of the House on H. R. 2055, 80th Cong., 1st Sess. 44 (1947).

II. A Court of Appeals Should Not Issue Mandamus to Review a District Court's Interlocutory Exercise of Discretion under Section 1404(a).

Petitioners concede that if Chief Judge Kirkpatrick was correct in exercising his discretion to transfer these cases under Section 1404(a) without regard to what he called "the stringent requirements of . . . forum non conveniens" (R. 12), the court of appeals properly refused their applications for mandamus or prohibition.[32] As has been demonstrated in part I, Judge Kirkpatrick correctly understood the scope of the discretion accorded to him by Section 1404(a) and, therefore, the court of appeals properly denied the petitions.[33] Even if it could be said that Judge Kirkpatrick's view of Section 1404(a) was not correct, it would not follow that the court of appeals should have granted the writs of mandamus in these cases. Rather, there were compelling reasons for refusal to review his exercise of discretion by the extraordinary writ of mandamus.

Petitioners concede that an order granting or refusing a transfer under Section 1404(a) is not an appealable order, because it lacks finality.[34] They point out that in the absence of an opportunity to appeal it may be that there is no effective appellate court review of a district judge's action in granting or denying transfer.[35] From this they argue that mandamus was properly available to review a transfer order which, they claim, was improperly entered. This does not follow.

In *Ex Parte Collett*, 337 U. S. 55, 72 (1949), because the transfer involved had been properly granted, this Court

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32. Petitioners' Brief, p. 27.

33. See *Ex Parte Collett*, 337 U. S. 55, 72 (1949), in which this Court did not have to pass upon the appropriateness of the use of mandamus to review transfer orders since petitioner's interpretation of Section 1404(a) was rejected.

34. Petitioners' Brief, p. 27.

35. Petitioners' Brief, pp. 27, 32.

did not reach the question of the availability of mandamus to review transfer orders. It said on that point:

> ". . . we need not decide whether denial might be placed on other grounds also. 'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . . As extraordinary remedies, they are reserved for really extraordinary causes.' *Ex Parte Fahey,* 332 U. S. 258, 259, 260 (1947)."

In the very recent opinion of Chief Judge Magruder, *In Re Josephson,* — F. 2d — (1st Cir. December 23, 1954 —not yet reported), the court reviewed in detail the development of the mandamus procedure, and outlined the narrow limits of its availability. With reference to a contention such as the petitioners advance in the instant cases, the court said (p. 12 of the unreported opinion):

> ". . . assuming that if the transfer order is ever to be reviewed it must be now, we do not forget that *appellate review is not of the essence of due process* . . . . Particularly, there may be *strong reasons of policy why litigation should not be delayed by appellate review of an administrative order of the sort here involved.* It is not unlike an order by a federal district court remanding a case to the state court from which it had been removed. Here Congress has specifically provided that such an order 'is not reviewable on appeal or otherwise.' 28 U. S. C. § 1447(d), as amended. In certain situations, the fact that a prejudicial order unless presently reviewable can never be corrected on appeal may be a consideration bearing on whether the order is to be deemed a 'final decision' from which an appeal may be taken under 28 U. S. C. § 1291 . . . . But we do not have such a situation here, since it is conceded that the transfer order now in question is an unappealable interlocutory order." (Citations omitted and emphasis supplied.)

Except in special situations not pertinent here, Congress has limited the appellate jurisdiction of the courts of appeal to final judgments and final orders. This facilitates expeditious disposition of cases and prevents piecemeal appeals. If one could successfully argue that, because not appealable, an interlocutory order should be reviewed by mandamus, the congressional purpose of preventing piecemeal appeals would be effectively thwarted. *Roche v. Evaporated Milk Ass'n*, 319 U. S. 21, 30 (1943); *United States Alkali Export Ass'n, Inc. v. United States*, 325 U. S. 196, 202-203 (1945).

A situation comparable to that of the instant cases was presented in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379 (1953). There the district court granted a transfer pursuant to 28 U. S. C. § 1406(a), and the court of appeals denied a petition for mandamus to vacate the transfer order. In sustaining denial of the writ, this Court said (pp. 382-383):

> "If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act [28 U. S. C. § 1651(a)]. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction."

Although the case involved a transfer under Section 1406(a) rather than Section 1404(a), the reason for refusing mandamus is apposite in cases involving Section 1404(a). The extraordinary writ of mandamus is not to be used to substitute the appellate court's discretion for that of the district judge.

In the *Josephson* case, *supra*, the court considered, *inter alia*, the claim that the district judge had abused his discretion in directing a Section 1404(a) transfer. As to this, it said (pp. 14, 15, 16 of the unreported opinion):

> "As to the . . . [contention] that the order of transfer was an 'abuse of discretion' under the cir-

> cumstances, we are clear that as a matter of general policy we ought not to go into that in the present proceeding. 'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. . . . We do not think that the predominant consideration governing our decision whether to issue the extraordinary writ of mandamus should be that at all costs we must prevent the transfer out of the circuit of every single case that ought to remain here subject to our potential appellate jurisdiction. . . . We do not anticipate that, on balance, our potential appellate jurisdiction will suffer any significant impairment. On the other hand, § *1404(a) provided an administrative facility that was supposed to contribute to convenience and expedition in the disposition of cases. This policy would certainly be defeated if the courts of appeals in the transferor districts should make it a routine practice to hold up the trial of a case pending review on mandamus of the question where the case ought to be tried.* . . .
>
> "Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus." (Emphasis supplied.)

The court gave unqualified endorsement to the reasoning in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010, 1011-12 (3d Cir. 1952), where Judge Goodrich had likewise "served notice" that mandamus proceedings would

not be allowed to defeat the object of Section 1404(a). As Judge Goodrich put it:

> ". . . the effort is being made both in this court and elsewhere to substitute for appeal a review by mandamus whenever the losing party on a motion to transfer wants an advance review of the ruling on this point.
>
> *"We think that this practice will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.*
>
> "Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. *But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.*
>
> "We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon." (Footnote omitted and emphasis supplied.)

Thus, the Court of Appeals for the Third Circuit has recognized that mandamus to review transfer orders is inappropriate unless the district judge has failed to consider the interest stipulated in Section 1404(a). The Court of Appeals for the First Circuit has similarly indicated that it will not review transfer orders by mandamus except in extraordinary situations the nature of which it has not yet defined.

In the instant cases the respondent, Chief Judge Kirkpatrick, gave careful consideration to the interests stipu-

lated in Section 1404(a). He pointed out that the petitioners were injured in an accident which occurred in South Carolina and discussed the convenience of the parties and their witnesses, concluding that there was a "heavy balance of convenience in favor of the defendant in connection with the liability witnesses" (R. 14). He recognized the conflicting conveniences so far as medical witnesses were concerned. In exercising his discretion in favor of the transfer he also gave weight to the congested condition of the trial calendar in his district, to the plaintiffs' choice of forum, to the residence of the plaintiffs, and to the fact that the only plaintiff who was a resident in the District had previously instituted suit in Chicago. The factors which formed the basis for Judge Kirkpatrick's conclusion that transfer to South Carolina was proper are the same factors which would have been involved in considering a motion for dismissal because of *forum non conveniens*, before enactment of Section 1404(a). This Court summarized those factors in the *forum non conveniens* case of *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508, 509 (1947), as follows:

> "An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.
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> • • •
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> "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litiga-

tion. . . . There is a local interest in having localized controversies decided at home."

There can be no doubt that Judge Kirkpatrick did not exceed his power to transfer under Section 1404(a). In fact, were *forum non conveniens* still applicable, the circumstances of these cases would have called for a dismissal under that doctrine. Despite their claims to the contrary,[36] petitioners' applications for writs of mandamus in these cases are nothing more than attempts to obtain appellate review of the discretion exercised by Judge Kirkpatrick. The Courts of Appeals for the First and Third Circuits have wisely determined that such attempts, through the use of the mandamus procedure, should be stopped at the threshold. In directing transfers of the instant cases the respondent stated, "the balance of convenience . . . make[s] the transfer proper" (R. 12). Slightly different semantics of "a strong case for a transfer" or "more than a bare balance of convenience" would have satisfied Judges Frank and Learned Hand, respectively, in *Ford Motor Co. v. Ryan*, (182 F. 2d 329 at pp. 330, 332). Whether a judge directing a transfer uses one or the other of these word formulae can hardly be said to create the extraordinary situation calling for the extraordinary remedy of mandamus. Mandamus is not available to probe the thought or word processes incident to the exercise of judicial discretion. Only where the district court has considered interests not pertinent under the statute or where it has ignored factors which must be taken into account is it proper to review a transfer order by mandamus.[37] To further expand the mandamus jurisdiction of the Courts of Appeals would be to ignore Congress' prohibition against piecemeal

36. Petitioners' Brief, pp. 27, 33.

37. As was demonstrated in Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 16-19, the decisions of other courts of appeals which have been concerned with use of mandamus to review Section 1404(a) transfer orders are consistent with the views expressed by the Courts of Appeals in the First and Third Circuits.

appeals, and to prevent the use of Section 1404(a) as a tool for wise and progressive administration of justice. In the instant cases, where, in exercising his discretion, the district judge gave due consideration to all the applicable factors (whether derived from Section 1404(a) or from the doctrine of *forum non conveniens*), the court of appeals properly refused to make the mandamus procedure available to the petitioners.

CONCLUSION.

On the facts presented in the instant cases Chief Judge Kirkpatrick correctly exercised his discretion in directing transfer under Section 1404(a). The statute must be taken to mean what it says. To subject it to limitations thought to be derived from the doctrine of *forum non conveniens* would defeat Congress' purpose. Moreover, the interlocutory exercise of discretion to transfer is not reviewable by the extraordinary writ of mandamus. For these reasons the orders of the Court of Appeals, denying the applications for writs of mandamus or prohibition, should be affirmed.

Respectfully submitted,

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